ERNEST L. BREWINGTON

IBLA 83-286 Decided May 24, 1983

Appeal from decision of the California State Office, Bureau of Land Management, declaring mining claim, CA MC 58755, null and void ab initio, in part.

Affirmed.

1. Mining Claims: Determination of Validity -- Mining Claims: Lands Subject to -- Segregation -- Small Tract Act: Classification -- Withdrawals and Reservations: Effect of

A mining claim located on land segregated from all forms of appropriation, including locations under the mining law, by a small tract classification order is null and void ab initio.

APPEARANCES: Ernest L. Brewington, pro se.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Ernest L. Brewington has appealed the decision of the California State Office, Bureau of Land Management (BLM), dated January 11, 1982, declaring the Sno Ta Hae placer mining claim, CA MC 58755, null and void ab initio in part.

Appellant and five other claimants 1/ located the Sno Ta Hae claim on October 20, 1979, in the NW 1/4 NW 1/4 sec. 3, T. 45 N., R. 7 W. Mount Diablo meridian, and the SW 1/4 SW 1/4, W 1/2 SE 1/4 SW 1/4 sec. 34, T. 46 N., R. 7 W., Mount Diablo meridian. 2/ The BLM decision states that Small Tract

1/ The other claimants are Sharon Brewington, Lee Brewington, Robert Geer, and Barbara Geer.
2/ The claimants initially located the Sno Ta Hae claim on Dec. 29, 1978, but failed to file a copy of their notice of location with BLM within 90 days as required by section 314 of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1744 (1976). BLM received their filing on Oct. 5, 1979, and thereafter issued a decision dated Oct. 16, 1979, declaring the claim abandoned and void pursuant to FLPMA.

Classification Order, California No. 606, issued by BLM on November 28, 1960, segregated the NW 1/4 sec. 3, T. 45 N., R. 7 W., Mount Diablo meridian, among other lands, from appropriation including locations under the mining laws. BLM held therefore that the Sno Ta Hae claim was null and void ab initio as to that part situated in the NW 1/4 sec. 3 because the land was not subject to mining location on October 20, 1979.

In his statement of reasons, appellant makes four arguments. First, he questions how the small tract classification can be applied in this case when the Small Tract Act, 43 U.S.C. § 682a (1970) has been repealed. Second, he states that he took over this mining claim from the previous claimant and the records of the claim go back to before 1960. Third, he notes that following BLM's 1979 rejection of his recordation documents because they were filed late, he requested a hearing and never received any response. Finally, he argues that a placer claim "is for the time being no longer part of the Public Domain" under Frey v. Garibaldi, 72 P.2d 554 (Cal. Dist. Ct. App. 1937), opening the argument that "BLM has no jurisdiction on any mining claim and all actions by them are not lawful."

[1] Small Tract Classification Order, California No. 606, dated November 28, 1960 (25 FR 12847 (Dec. 14, 1960)), classified 1527.10 acres of land in T. 45 N., R. 7 W., Mount Diablo meridian, Siskiyou County, California, including that portion of sec. 3 at issue, as suitable for title transfer under the Small Tract Act. Paragraph 2 of the order provided that "[c]lassification of the * * * lands by this order segregates them from all appropriations, including locations under the mining laws."

Appellant is correct that the Small Tract Act has been repealed. See FLPMA, § 702, 90 Stat. 2789. However, section 701(c) of FLPMA, 43 U.S.C. § 1701 note, provided that "[a]ll withdrawals, reservations, classifications, and designations in effect as of the date of approval of this Act shall remain in full force and effect until modified under provisions of this Act or other applicable law." BLM's official status plat for sec. 3 reflects that the NW 1/4 NW 1/4 of the section remains subject to the classification order and therefore segregated from mining location. It is well established that mining claims located on land not open to mineral entry are properly declared null and void ab initio. J. Pat Kaufman, 71 IBLA 183 (1983); Lester M. Holt, 69 IBLA 180 (1982). See Osborne v. Hammit, 377 F. Supp. 977, 981-83 (D. Nev. 1964).

As to appellant's other arguments we find the following. First, appellant has presented no evidence documenting his assertion that this mining claim has been in existence since before 1960. Nevertheless, we point out that under section 314 of FLPMA, 43 U.S.C. § 1744 (1976), the owner of a mining claim located on public lands on or before October 21, 1976, was required to file with BLM a copy of the official record of the notice of location for the claim filed under state law on or before October 22, 1979. Failure to so file conclusively constituted abandonment of the claim. See 43 CFR 3833.1-1 (47 FR 56305 (Dec. 15, 1982)).

Following receipt of BLM's October 16, 1979, decision rejecting his untimely recordation filings for the claim (see note 2, supra), appellant sent a letter to BLM, received on November 13, 1979, along with new recordation filings following his relocation of the claim on October 20, 1979. BLM apparently neither responded to the letter nor treated it as an appeal by forwarding it to the Board. 3/ In effect this denied appellant an appeal from the October 16, 1979, decision. After review of the case file, we conclude that if it had been forwarded we would have affirmed the decision, since appellant's failure to comply with the recording requirements of 43 U.S.C. § 1744 (1976) constitutes a conclusive presumption that the claim has been abandoned. As stated in Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981):

> The conclusive presumption of abandonment which attends the failure to file an instrument required by 43 U.S.C. § 1744 (1976) is imposed by the statute itself, and would operate even without the regulations. See Northwest Citizens for Wilderness Mining Co., Inc. v. Bureau of Land Management, Civ. No. 78-46 M (D. Mont. June 19, 1979). A matter of law, the conclusive presumption is self-operative and does not depend upon any act or decision of an administrative official. In enacting the statute, Congress did not invest the Secretary of the Interior with authority to waive or excuse noncompliance with the statute, or to afford claimants any relief from the statutory consequences. Thomas F. Byron, 52 IBLA 49 (1981).

53 IBLA at 196, 88 I.D. at 371-72.

Finally, with respect to appellant's reference to the holding of the court in Frey v. Garibaldi, supra, we need only quote the ruling of the court as expressed in the case headnote: "As respects right to appropriate water, where notice of location of placer mining claim is posted and filed, claim for time being is no longer part of unappropriated public domain of United States." (Emphasis added.) The Department of the Interior, acting through BLM, has jurisdiction to determine the validity of unpatented mining claims. Best v. Humbolt Placer Mining Co., 371 U.S. 334 (1963).

3/ The letter read in part:

"I have reservations and questions about BLM's arbitrary actions in refusing to file the claim just because it did not comply with your regulations of having to be within the 90-day period. I do not think we have to go through an appeal, providing you can answer satisfactorily some questions I have. Therefore I am asking for an extension on the time period to file an appeal pending further clarification from your agency. If this can not be done consider this notification that I, Ernest L. Brewington, request an appeal on your refusal to file my claim."

A Jan. 1982 handwritten note on the letter reads: "There is a late filing record which this never got applied to; am pulling it from late filings and consolidating it into this file."

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the California State Office is affirmed.

Will A. Irwin
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

R. W. Mullen
Administrative Judge